relationship between licensees and managers be closely scrutinized.

<u>See</u> Comments of Sprint Corporation at pp.13-15. In this regard

American Group proposes licensees should be required to file all

management or construction contracts with the FCC to ensure that

control of the licensee is not being transferred or assigned by

means of such agreements. 24/

33. Licensees that request Commission consent to premature of licenses transfers or assignments should, as Unique Communications Concepts suggested, be required to place the balance of the payment due on the auction price in an escrow account at the time the application for FCC consent is filed. 25/ This requirement could be waived and satisfied with a certification of financial qualification by the transferee or assignee in those cases where the transaction is between two designated entities or from a nondesignated entity to a designated entity. In cases where the license is sold to a non-designated entity, upon closing of the transaction, the money in escrow would be released and paid to the FCC.

## VIII. SPECIFIC SERVICES

## A. Cellular Unserved Area Applications

34. American Group disagrees with the Commission's tentative

<sup>24/</sup> Broadcasters are subject to the same conditions with respect to Local Management Agreements ("LMAs"). LMAs allow another entity to "manage" certain aspects of the station and the Commission examines the agreements to make sure that the licensee (not the management contractor) remains in control of the facility.

See Comments of Unique Communications Concepts, pp. 3-4.

conclusion to use an auction process to grant licenses for cellular unserved areas where the applications were on file with the Commission before July 26, 1993. In adopting the Act, Congress adopted a Special Rule giving the FCC permission to conduct lotteries instead of auctions to issue licenses based on mutually exclusive applications on file prior to July 26, 1993. 26/ In fact, the first cellular fill-in application lotteries were scheduled for September 16, 1993 and the applications involved were all filed prior to July 26, 1993. 27/ Instead of proceeding with lotteries as it did with similarly situated IVDS application, the Commission used the instant NPRM to tentatively conclude that unserved area cellular applications should be issued by auction and not lottery. See NPRM ¶ 160. Such a conclusion thwarts one of the requirements that Congress imposed on the Commission in establishing auction auction of cellular unserved area licenses will totally preclude the involvement of designated entities because all eligible applicants, large and small, applied for the same set of frequencies in the same markets. Large well-heeled companies will simply be able to outbid smaller entities.

35. American Group agrees with the small businesses that filed initial Comments that, absent a set-aside or bidding preferences, lotteries should be used to award licenses for unserved areas. First and foremost, as recited in the Comments of

See Budget Act Special Rule § 6002(e)(2) of the Act.

See Comments of John G. Andrikopoulos, et al, pp. 2-3.

John G. Andrikopoulos, et al., the legislative history of the Act makes clear that Congress intended lotteries to be used for applications filed prior to July 26, 1993, 28 and the auction procedures, when finally developed, should not be applied retroactively. 29 In addition, as the Small RSA Operators argue, there is nothing to be gained by switching to an auction process with respect to cellular unserved area applications, and any financial benefit for the government that might arguably accrue will be more than offset by the costs associated with the administrative nightmare that would be created. 30/

36. In establishing the application procedure for the issuance of cellular fill-in licenses, the Commission adopted safeguards that were designed to reduce the ability of speculators to participate in these lotteries. For example, there is a twelve month build-out requirement and a prohibition against transfers or

See Andrikopoulos Comments at pp. 4-7.

 $<sup>\</sup>frac{29}{}$  Id. at pp. 8-15.

Southwestern Bell, BellSouth Corporation and subsidiaries, and Bell Atlantic, each a large, multifaceted telecommunications corporation, all support the use of auctions to licensees to serve cellular unserved areas. businesses and individuals, such as Andrikopoulos, and consortia such as the Small RSA Operators and The Quick Call Group, all support the use of lotteries to issue cellular unserved area The commenters all discuss the legal issues that licenses. surround whether the Commission can change its course in mid-stream and retroactively apply the auction procedure to applications that are already on file. However, when boiled down to the simple equities, the big companies want auctions because they are confident they will be able to outbid any small companies, while the small businesses are certain that without a lottery, they will be unable to compete for cellular unserved area licenses.

assignments of a license until one year after the system is in operation. 31/2 Judging by the number of applications filed, it appears that these safeguards have had the desired effect. 32/2

37. Another concern is that changing the process in midstream could result in litigation that will either hold up the auction process even after cellular unserved area auction rules are promulgated by the FCC or, if the auctions are held despite litigation, result in the licenses selling for less than market value because of the uncertainty of unresolved litigation. (Clearly, the public interest and the intent of Congress will be served only if the Commission uses lotteries to issue cellular unserved area licenses.

## B. IVDS Applications

38. The Act added a new Section 309(j)(2) to the Communications Act of 1934 which describes under what circumstances competitive bidding should be used to issue licenses for particular services. One of the requirements is that "the principal use of the spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers" (emphasis added). With respect to IVDS, the Commission has tentatively concluded that the service will be subscriber based and thus licenses should be awarded by auction. See NPRM ¶ 143. However, the Commission

 $<sup>\</sup>underline{31}$  See Small RSA Operators Comments at pp. 5-6.

 $<sup>\</sup>frac{32}{}$  Id. at pp. 6-7.

<sup>10.0</sup> Id. at 7-8.

offers no evidentiary support for this conclusion in the NPRM.

American Group believes there is no such evidence, as the FCC's tentative conclusion is based on a faulty assumption.

- 39. To receive IVDS service, a customer need only to go to any electronics store and purchase the necessary equipment, much in the manner a consumer purchases a VCR. There will be no equipment rental fee, which could arguably be equated to a subscription fee. The "services" offered will be provided by different vendors, who will charge the customer on a per-use basis, so that the fees will be transactional as opposed to subscription, and under a likely scenario, the payment to the licensee will come from service providers as opposed to customers. Thus, IVDS is not a traditional "subscription" service as contemplated by the Act, which makes the use of a lottery system for the issuance of IVDS licenses entirely appropriate.
- 40. Radio Telecomm and Technology, Inc. ("RTT"), a pioneer of IVDS technology, would rather see auctions used to distribute IVDS licenses. However, its reasons are purely economic and advance its pecuniary interest in having only deep-pocketed licensees to purchase its equipment. RTT believes that auctions will "award licenses to parties who are most likely to have the ability and resources to develop IVDS systems." RTT Comments at p. 1-2. RTT's position does not discuss any safeguards for designated entities,

 $<sup>^{34/}</sup>$  Independent Cellular Consultants ("CC") also opposes auction of IVDS licenses and suggests, as American Group does, that services can be offered on a non-subscriber basis. See ICC Comments at p.2.

instead merely promoting the idea that only the most financially able should be able to "play."

- The Richard L. Vega Group ("RLV"), which is a group of telecommunications engineers and consultants, comes closer to the mark, stating that in light of competition in the interactive video market, the success of IVDS licensees will rest on providing the service to subscribers at no charge. See RLV Comments at pp. 11-12 IVDS licensees will, as American Group suggests, have to rely on payments per transaction. Another factor the Commission should consider, as RLV notes in its Comments, is that IVDS can, at best "...provide only an overlay for existing video/data material." Id. The natural allies of IVDS (broadcast television and at p. 12. other mass media services) have been specifically excluded from auctions. American Group believes IVDS should be treated more like a "broadcast auxiliary service" and, presumed to be a nonsubscriber based service for purposes of the Act.
- 42. Since there are no working models in place, any conclusion as to whether or not IVDS will be a subscriber-based service is grounded more on speculation than fact. Rather than rush to a premature (and possibly incorrect) conclusion, at the very minimum, American Group proposes a "wait and see" option.

## IX. CONCLUSION

43. American Group strongly endorses those proposals that are designed to encourage and promote entrepreneurial participation in the Commission's auction processes. Its Reply Comments herein represent a plan to assist and encourage meaningful participation

by qualified entities without creating an environment conducive to speculators and without creating loopholes that would permit big companies to masquerade as small businesses. Adoption of the rules advocated in these Reply Comments will help ensure that important Congressional objectives will be served.

Respectfully submitted,

AMERICAN 52 EAST, AMERICAN 52 WEST, AMERICAN INTERACTIVE EAST, AMERICAN INTERACTIVE WEST, U.S.A. INTERACTIVE PARTNERS, VISION INTERACTIVE AND PREMIER INTERACTIVE

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